72-239

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO. ..... 72-239

HARRIOTT H. CHILDS,

*Petitioner*,

*v.*

UNITED STATES OF AMERICA,

*Respondent*.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

# SUPREME COURT OF THE UNITED STATES

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NO. _____

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HARRIOTT H. CHILDS,

*Petitioner*,

*v.*

UNITED STATES OF AMERICA,

*Respondent*.

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Harriott Childs, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on July 13, 1972, affirming a judgment of the United States District Court for the Eastern District of Virginia, finding the petitioner guilty of possession of marijuana with the intent to distribute it. The District Court judgment was entered on the 9th day of June, 1971.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is included herein as Appendix A to this Petition.

## JURISDICTION

The United States District Court for the Eastern District of Virginia entered a final judgment against the petitioner on the 9th day of June, 1971; the United States Court of Appeals for the Fourth Circuit entered a final judgment against the petitioner on July 13, 1972.

## QUESTION PRESENTED

Does the Due Process Clause of the Fifth Amendment to the Constitution of the United States require that a conviction of your petitioner under the Assimilative Crimes Act be reversed when the conviction is based upon a provision of Virginia State Law which authorizes a conviction for possession ***with intent to distribute*** a controlled drug based solely on evidence of the quantity of the controlled drug possessed by your petitioner.

## CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Due Process Clause of the Fifth Amendment to the Constitution of the United States as set forth below:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be

twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

## STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are Section 54-524.-101 (a) of the 1950 Code of Virginia, as amended, which provides:

"Except as authorized by this chapter, it shall be unlawful for any person knowingly or intentionally:

(1) To distribute, or to possess with intent to distribute, a controlled drug;
(2) To manufacture a controlled drug.

A conviction for a violation of this §54-524.101 (a) may be based solely upon evidence as to the quantity of any controlled drug or drugs unlawfully possessed."

and Section 54-524.101 (c) of the 1950 Code of Virginia, as amended, which in pertinent part provides:

"It is unlawful for any person knowingly or intentionally to possess a controlled drug * * *. Any person convicted of a violation of this subsection with respect to the controlled drug marijuana shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than one thousand dollars or shall be confined in jail not exceeding twelve months, or both."

## STATEMENT

### *How Federal Question Is Presented*

The Federal question sought to be reviewed was raised in the motion for judgment of acquittal made by the petitioner in the United States District Court for the Eastern District of Virginia and formed the basis for the appeal to the United States Court of Appeals for the Fourth Circuit.

### *Statement of Facts*

Petitioner was indicted under the Assimilative Crimes Act, Title 18 United States Code, Section 13 for a violation of Section 54-524.101 of the 1950 Code of Virginia, as amended June 26, 1970. Childs was convicted by a jury in the United States District Court for the Eastern District of Virginia (Oren R. Lewis, J.), of possessing 30 pounds of marijuana with intent to distribute. On June 9, 1971, she was sentenced to imprisonment for three years; thirty months of which was suspended.

On January 30, 1971, a trunk containing 30 pounds of marijuana was received for shipment at the American Air Lines Air Freight office at Los Angeles International Airport. The Air Freight supervisor's attention was attracted to the trunk, so he had the trunk opened. Inside, under a layer of mothballs, were 16 marijuana bricks (Tr. 30-35).*

The Federal Bureau of Narcotics and Dangerous Drugs was contacted, and an agent went to the airport to arrange for the trunk to be shipped to the addressee, "Pamela Feldman" in Washington, D. C. (Tr. 44).

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* References in the form of "Tr." are to the stenographic transcript of the trial.

The BNDD in Washington, D. C. was notified and on January 31, 1970, BNDD agents went to National Airport to await the arrival of the trunk and its claimant. At approximately 12:05 p.m., Childs entered the American Air Freight office and presented the clerk with a claim bill (Tr. 54, 63). She then directed an attendant to put the trunk on the rear seat of her car. After he did this, she signed "Pamela Feldman" on the receipt (Tr. 57). The agents then came forward to arrest her and she again identified herself as Pam Feldman (Tr. 176).

The petitioner testified she was duped by a friend into going to the airport to pick up the trunk. She did not know what was in the trunk, and she only identified herself as Pamela Feldman to expedite matters.

## REASONS FOR GRANTING THE WRIT

Petitioner makes no claim that the statute making possession with intent to distribute a controlled drug unlawful is invalid. Petitioner does claim, however, that the further provision authorizing a conviction of your petitioner for possession with intent to distribute a controlled drug based solely on the quantity of the drug possessed violates the Due Process Clause of the Fifth Amendment.

The Drug Control Act (1970, Chapter 650) adopted by the State of Virginia and effective June 26, 1970, provided, inter alia, as codified in Section 54-524.101(a), that it was unlawful for any person knowingly or intentionally to manufacture, distribute or "to possess with intent to distribute, a controlled drug." Marijuana was defined elsewhere in the Act as such a drug.

The Virginia General Assembly further provided that "a conviction for a violation of this Section 54-524.101(a)

may be based solely upon evidence as to the quantity of any controlled drug or drugs unlawfully possessed."

Your petitioner was prosecuted under the Assimilative Crimes Act for Violation of this Section 54-524.101. See the indictment which is included as Appendix B herein.

No evidence was offered at the trial of any efforts on the petitioner's part to distribute the marijuana, only that she received that quantity at Washington National Airport. The Court instructed the jury under the provisions of Section 54-524.101 (a) that they could, if they found the petitioner knowingly and intentionally possessed the marijuana, return a conviction against her for possession with the specific intent to distribute the marijuana, based solely on evidence as to the quantity of the controlled drug she possessed. See the Instructions, Appendix C.

Your petitioner argues that this provision of Virginia Law violates the Due Process Clause of the Fifth Amendment of the Constitution of the United States.

The provision is vague and ambigious, it appears to create an irrational presumption and otherwise violates concepts of due process and fundamental fairness.

What does the expression, authorizing a conviction "solely upon evidence as the quantity" of drug possessed, mean? What is its intent and function? Is it a rule of evidence? Does it raise an inference? Does it raise a presumption? Does it create a new substantive crime—possession of "X" quantity—with greater penalties than simple possession?

What does the expression "as to quantity" mean? Whatever it is, it authorizes the fact finder to arbitrarily seize

upon a single fact "quantity", and return a conviction for manufacture, distribution or possession with intent to distribute.

> "It is elementary that an act creating a statutory offense, to be valid, must specify with reasonable certainty and definiteness the conduct which is commanded or prohibited, that is, what must be done or avoided, so that a person of ordinary intelligence may know what is thereby required of him.
>
> "The enactment should define the acts to be done or not to be done which constitute such offense with such certainty that a person may determine whether or not he has violated the law at the time he does or fails to do the act." *Caldwell v. Commonwealth*, 198 Va. 454, 94 S. E. 2d. 537.

Vague and imprecise drafting furnishes a convenient tool for "harsh and discriminatory enforcement by prosecuting officials against particular groups deemed to merit their displeasure." *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940). The legality of the Section "is to be tested *not* by what has been done under it, but by what *may* be its authority, be done." *Assaid v. Roanoke*, 179 Va. 47, 18 S. E. 2d. 287, 288. And when a statute fails to establish reasonable and discernible standards for its application "it offers the opportunity for arbitrary action and discrimination," regardless of whether it has been heretofore arbitrarily or discriminatorily applied. *Andrews v. Board of Supervisors of Loudon County*, 200 Va. 637, 107 S. E. 2d. 445.

A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differs as to its

application violates the first essential of due process of law. *Cramp v. Board of Public Instruction*, 368 U. S. 278, 7 L. Ed. 2d 285; *U. S. v. Spector*, 96 L. Ed. 863; *U. S. v. Petrillo*, 332 U.S.1, 91 L. Ed. 1877; *U. S. v. Darby*, 317 U.S. 100, 85 L. Ed. 609; *Pearson v. Probate Court*, 309 U.S. 270, 84 L. Ed. 744; *Kay v. U. S.*, 303 U.S. 1, 82 L. Ed. 607.

A statute must convey sufficiently definite warning as to the prescribed conduct when measured by common understanding and practice. *Roth v. U. S.*, 354 U.S. 476, 1 L. Ed. 2d 1498. The constitutional vice in vague, indefinite statutes is in injustice to the accused in placing him on trial for an offense of whose nature he was given no fair warning. *C. I. O. v. Douds*, 339 U.S. 382, 94 L. Ed. 925.

Such a State statute when applied in the Federal courts through the Assimilative Crimes Act violates the Fifth Amendment to the Constitution of the United States.

Perhaps Section 54-524.101(a) can be read as raising a presumption, to-wit: that possession of some unspecified quantity of a controlled drug is sufficient evidence of the petitioner's guilt of possessing the controlled drug with the intent to distribute it. But note that the provision as written authorizes a conviction for manufacturing and actual distribution as well based solely on the quantity of the drug possessed.

Such a presumption is irrational in that the judge or jury may presume either manufacture, or distribution or possession with intent to distribute from the base fact of possession of a drug. Likewise, the fact finder could presume the defendant was guilty of all three, manufacturing, distributing, and possessing, with intent to distribute from the single fact of possession.

> "A criminal statutory presumption must be regarded as 'irrational' or 'arbitrary' and hence, unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is ***more likely than not*** to flow from the proved fact on which it is made to depend." ***Leary v. United States***, 395 U.S. 6, 36; 23 L. Ed. 2d 57, 82; 89 S. Ct. 1532. (emphasis supplied)

With respect to quantity, does possession of two "joints" of marijuana activate the presumption on the theory that the petitioner, able to smoke only one at a time, intends the second for someone else? Does possession of a dozen or two dozen or more marijuana cigarettes ever raise the presumption that the petitioner manufactured them? Or is distributing them? If possession of "a large amount" triggers the presumption, what is "a large amount"?

In determining whether the presumed fact is likely to flow from the proved fact "significant weight should be accorded the capacity of the" legislature "to amass the stuff of actual experience and cull conclusions from it." ***United States v. Gainey***, 380 U.S. 63, 67, 13 L. Ed. 2d 658, 662, 85 S. Ct. 754 (1965). And in *Leary v. United States*, *supra*, 395 U.S. at 39, 23 L. Ed. 2d at 83, the court placed heavy reliance on "extensive hearings before House and Senate Committees" in determining that Congress had made factual inquiry into the rationality of the presumption therein.

In the instant case, the presumptions in Section 54-524.101 (a) had no such legislative underpinnings. In Virginia House Document No. 27, (1970), a committee consisting of members of the Virginia General Assembly proposed to the Governor of Virginia that a model drug control act be adopted at the 1970 Session of the General

Assembly. The Committee's recommendations, in pertinent part, proposed a Section 54-524.101 (a) identical to the subsequently enacted version except that the clause providing:

> "A conviction for a violation of this § 54-524.101 (a) may be based solely upon evidence as to the quantity of any controlled drug or drugs unlawfully possessed."

was not included.

The House Bill No. 271, embodying the Committee's recommendations was introduced and referred to the House Committee on General Laws. Hearings were held and the Bill, with § 54-524.101 (a) intact as proposed, was reported out with amendments. The Bill passed the House with further amendments and was sent to the Senate with §54-524.101 (a) intact as proposed. It was referred to the Committee on General Laws, and was subsequently reported to the Senate.

The Bill did not reach the Senate Floor until shortly before adjournment. Thereupon, the Senate agreed to an amendment proposed by Senator Brault that § 54-524.-101 (a) be amended by adding the clause, above cited, authorizing a conviction for manufacture, distribution or possession with intent to distribute based solely upon evidence as to the quantity of drug possessed.

The clause had no historical antecedents in legislative fact finding and no where appears in the drug control acts of any state or the Federal Government. It admittedly was designed to facilitate the prosecution of drug cases by dispensing with the requirement that manufacture and distribution be proved by direct evidence, and authorized a conviction based upon one piece of circumstantial evidence, possession of "X" quantity of a controlled drug.

If the statute does not raise a presumption, but only an inference, the difference is slight. A statutory inference cannot be sustained insofar as it authorizes an inference of dispensing or distributing a controlled drug from the bare fact of possession. Such evidence is far short of sufficient to authorize a conviction for either of these acts. *Turner v. United States*, 396 U.S. 398, 421, 24 L. Ed. 2d 610, 626, 90 S. Ct. 642. cf. *Tot v. United States*, 319 U.S. 463, 87 L. Ed. 1519, 63 S. Ct. 1241 (1943); *United States v. Romano*, 382 U.S. 136, 15 L. Ed. 2d 210, 86 S. Ct. 279 (1965).

In any criminal offense involving a specific intent, the specific intent is an element of the offense to be proved by the Government beyond a reasonable doubt.

While intent as an element of the offense may be inferred from established facts, that is to say proved by circumstantial evidence, that is not to say that the Legislature may specify that a single circumstantial fact is sufficient to authorize a conviction. To do so is to permit the Legislature to invade the province of the judge and jury, rather then permitting the finder of fact free access to all of the evidence.

The statute in question otherwise makes the specific intent of the accused to distribute a vital and specific element of the offense charged.

> "When a statute makes an offense to consist of an act combined with a particular intent, that intent is just as necessary to be proved as the act itself, and *must* be found as a matter of *fact* before a conviction can be had; and no intent in law or mere legal presumption, differing from the intent in fact, can be allowed to supply the place of the latter." *Thacker v. Commonwealth*, 134 Va. 767, 114 S. E. 504.

"Undoubtedly a presumption which can be used to produce convictions without the necessity of proving a crucial element of the crime charged—and a sometime difficult-to-prove element at that—is a boon to prosecutors and an incongruous snare for defendants in a country that claims to require proof of guilt beyond a reasonable doubt." *U. S. v. Gainey*, Black, J, dissenting, 380 U.S. 63, 13 L. Ed. 2d 658.

Section 54-524.101 (a) violates the defendant's Fifth Amendment privilege against self incrimination because it coerces her to admit her guilt of possession so as to rebut the presumption that her possession established manufacture, distribution or possession with the intent to distribute.

Section 54-524.101 (c) of the 1950 Code of Virginia, as amended, makes it a crime to possess a controlled drug. When possession of that controlled drug is marijuana, the bare possession itself is a misdemeanor. The legislature then added a statutory provision which in effect states that "X" quantity of marijuana unlawfully possessed raises the misdemeanor to the status of a felony at some undefined point. The jury is given no standards or guidance as to what quantity is sufficient to authorize a felony conviction.

The defendant who would otherwise be charged with the misdemeanor of possessing marijuana must therefore take the stand and admit her guilt to possession so to enable herself to explain away the presumption of her intent if the quantity exceeds some unknown amount.

Mr.Justice McReynolds in the dissent in *Casey v. United States*, 276 U.S. 413, 420 (1928) considered the use of presumptions in criminal cases:

> "Once the thumb screw and the following confession made conviction easy; but that method was crude and, I suppose, now would be declared unlawful upon some ground. Hereafter, presumption is to lighten the burden of the prosecution. The victim will be spared the trouble of confessing and will go to his cell without mutilation or disgusting outcry."

A Petition for a Writ of Error is currently pending before the Virginia Supreme Court of Appeals chalienging the validity of this Section, ***Dennis Joe Sharp v. Commonwealth***. Additionally, in an opinion authored by the Honorable Wiley R. Wright, Jr., Judge, Corporation Court for the City of Alexandria, Virginia, on the 17th day of May, 1971, he said that this

> "language 'as to quantity' is so uncertain and indefinite as to be incapable of application by the trier of fact. This being the case, it violates the Due Process Clauses of the Fourteenth Amendment and of the Virginia Constitution, and the Court need not reach the question of whether or not there is a rational connection between the fact to be proven and the fact to be presumed." ***Commonwealth v. Patrick Martin Kelly***, Criminal Number F995, opinion letter of May 17, 1971, page 3.

The Virginia General Assembly at its 1972 Session repealed the offensive provision and rewrote § 54-524.101 as § 54-524.101:1. Your petitioner may be the only person ever tried in the Federal System under such a burden.

## CONCLUSION

For the aforegoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Philip J. Hirschkop
PHILIP J. HIRSCHKOP

Robert T. Hall
ROBERT T. HALL
Counsel for Petitioner

August 12, 1972

CERTIFICATE

I hereby certify that on the 12th day of August, 1972, I mailed, postage prepaid, a copy of the foregoing petition for writ of certiorari to the Solicitor General, Department of Justice, Constitution Avenue between 9th & 10th Streets, Washington, D. C. 20530, and to James J. Tansey, Esquire, Department of Justice, Washington, D. C. 20530.

Robert T. Hall
ROBERT T. HALL

STATE OF VIRGINIA,
COUNTY OF FAIRFAX, to-wit:

The foregoing certificate was subscribed and sworn to before me this 12th day of August, 1972.

/s/ Joan Marie Smith
Notary Public

My commission expires:
March 18, 1973

# APPENDIX A

## UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

NO. 71-1629

UNITED STATES OF AMERICA,
*Appellee*,

*v.*

HARRIOTT H. CHILDS,
*Appellant*.

*On Appeal from the United States District Court For the Eastern District of Virginia, at Alexandria Oren R. Lewis, District Judge*

Argued May 11, 1972.

Decided July 13, 1972.

Before CRAVEN and RUSSELL, Circuit Judges, and BLATT, District Judge.

Robert T. Hall for Appellant, and James J. Tansey, Attorney, Department of Justice (Brian P. Gettings, United States Attorney, on brief) for Appellee.

RUSSELL, Circuit Judge

The defendant was convicted under the Assimilative Crime Act[1] of knowing possession of marihuana with intent to distribute, in violation of Section 54-424.101 (a) of the Code of Virginia (1950), as amended. The marihuana, carefully packed in a trunk in the form of bricks weighing about a half pound each, was shipped by airline from Los Angeles, California, to Washington National Airport in Arlington County, Virginia. After receipt of the trunk for shipment, the Air Freight supervisor in Los Angeles for some reason, not explained in the record on appeal, became suspicious and had the trunk opened. Inside, under a layer of mothballs, were discovered sixteen (16) marihuana bricks. The federal narcotic officers were advised of the discovery and, apparently with the approval of such officers, the shipment was forwarded to its destination to the Washington National Airport. The trunk was addressed to "Pamela Feldman". When the shipment arrived at the Washington National Airport, the defendant presented the airline with the claim bill for the trunk, and, after signing "Pamela Feldman" to the receipt therefor, was given possession of the trunk. When the trunk was placed in defendant's car, the officers, alerted by the information received from Los Angeles, arrested her and prosecution followed. Convicted, the defendant has appealed contending that the District Court erred (1) in not finding the statute under which she was convicted unconstitutional, (2) in not granting her motion for an acquittal on grounds of insufficiency of evidence, and finally (3) in the instructions given the jury on the proof necessary to establish the element of intent to distribute.

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[1] 18 U.S.C. 13.

It is not necessary to tarry long on the defendant's claim of invalidity of the statute under which she was indicted and convicted. She does not and could not assail for vagueness the substantive provision of Virginia statute which made it an offense to possess marihuana with intent to distribute. After establishing and defining the offense itself, the statute concluded with the following subsidiary provision on sufficiency of evidence:

> "A conviction for a violation of this § 54-524.101 (a) may be based solely upon evidence as to the quantity of any controlled drug or drugs unlawfully possessed."

It is this subsidiary provision on sufficiency of evidence against which the defendant directs her claim of unconstitutionality. The mere fact, however, that this subsidiary provision may be invalid for vagueness, as defendant contends (a conclusion on which we venture no opinion), would not render the earlier substantive section creating the crime itself unconstitutional.[2] The relevance of the subsidiary provision would attach merely to the issue whether the evidence adduced by the prosecution was sufficient to permit submission to the jury and to the correctness of the Court's jury instructions on what proof was required to support a finding of intent to distribute. We shall accordingly address ourselves to those issues.

The contention that her motion for acquittal should have been granted because of insufficiency of proof of intent to distribute is palpably without merit. Intent is not susceptible of direct proof;[3] it must be proved by circumstances. The circumstances establishing such intent in a narcotic prosecution may properly consist of the quantity

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[2] **United States v. Jackson** (1968) 390 U.S. 570, 572-591, 88 S. Ct. 1209, 20 L. Ed. 2d 138.

[3] 21 Am Jur. 2d p. 164, §82.

of the product involved, the nature of its packaging, and other relevant facts. The circumstances in this case, including the quantity, method of packaging, false name of addressee, and other facts, were more than sufficient to justify the submission of the issue of intent to distribute to the jury. People do not normally order a thirty-pound trunk load of marihuana for personal use, especially when packaged as this shipment was.

The final contention of the defendant relates to the Court's charge on the element of intent to distribute. While in the introduction of his charge, the District Judge read the statute under which the defendant was indicted, including the subsidiary provision on the sufficiency of proof, this was merely preparatory to his specific charge and he did not, in the substantive part of his instructions setting forth the specific elements of the crime and the proof required to establish these separate elements, instruct the jury that intent to distribute might be presumed "*solely*" from the quantity of the marihuana possessed. As he stated in denying a motion for a new trial, he went quite "a step further" and instructed the jury that intent to distribute might be inferred "from the possession of a large quantity of marihuana, *among others and all other facts and circumstances in this case* that you may, *as I am telling you, you are not required to infer from all this relevant evidence that she intended to distribute it.*" (Italics added) He concluded this phase of his instructions with the statement that "the intention to sell (distribute) can be inferred from the amount in question and from all the other relevant circumstances in this case." As is thus seen, the Court did not rest his instruction on the sufficiency of proof of intent to distribute on the statutory standard, i.e., "solely upon evidence of the quantity":

In essence his instruction employed the standard of proof of intent normally to be applied in the absence of any statutorily authorized inference. In so instructing the jury, the Court was actually following the implicit ruling in *Turner v. United States*,(1969) 396 U.S. 398, the authority on which defendant relies. In concurring with the conviction on a count charging distribution in that case, Justice Marshall stated that "evidence of possession of 275 glassine bags of heroin proved beyond a reasonable doubt that Turner was distributing heroin in violation of 26 U.S.C. sec. 4704(a)." 396 U.S. at p. 424. Since the Court's questioned instruction on intent was not restricted to the statutory provision, the constitutionality of which the defendant assails but, on the contrary, conformed to what the legal rule of sufficiency of proof was, apart from any statutorily provided inferences, it is unnecessary to consider or pass on the constitutionality of the statutory standard of sufficiency of proof.

AFFIRMED.

## APPENDIX B

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**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF VIRGINIA**
**Alexandria Division**

UNITED STATES OF AMERICA

v.

HARRIOTT H. CHILDS
a/k/a
Pamela Feldman

} Criminal No.

MARCH 1971 TERM - At Alexandria

THE GRAND JURY CHARGES:

That on or about January 31, 1971 at Washington National Airport, Arlington, Virginia, within the special maritime and territorial jurisdiction of the United States and in the Eastern District of Virginia, HARRIOTT H. CHILDS, a/k/a Pamela Feldman, did willfully, knowingly and unlawfully possess approximately 40 pounds of the controlled drug, marihuana, with intent to distribute the said marihuana.

(violation of Title 18, United States Code 13, Sections 54-542.101 and 54-524.80(c)(7), Code of Virginia, 1950 as amended).

A TRUE BILL:

.....
Foreman

.....
Brian P. Gettings
United States Attorney

## APPENDIX C

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF VIRGINIA**
**Alexandria Division**

UNITED STATES OF AMERICA

v.

HARRIOTT H. CHILDS,
a/k/a Pamela Feldman

} Criminal No. 78-71-A

BEFORE
HONORABLE OREN R. LEWIS
United States District Judge

AND A JURY

May 10, 1971

APPEARANCES:

James Tansey, Esquire, and
Gilbert K. Davis, Esquire
Assistant United States Attorneys

For the United States of America,

Ira M. Lowe, Esquire,
William Farnsworth, Esquire,
David M. Basker, Esquire, and
Gary D. Weinstein, Esquire

For the Defendant.

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Now, this charge is based upon a section of the Virginia Code. Specifically it's predicated on Section 54-524.101 of the Virginia Code. It is based on the Virginia Code because it is applicable in a federal court under what we call the Assimilated Crimes Act.

Although the alleged crime occurred on a federal reservation, to wit, National Airport, which is federal in this case, Virginia law is applicable. The airport is in Virginia. So you shall accept that as the law.

The law in question is very short. The pertinent portion of that section, Chapter 54 of the Virginia Code, pertains to the possession and distribution and manufacture, and so forth, of various and sundry types of drugs, and it says who can possess them and manufacture them and control them, and it includes all kinds of drugs. There are many of them specified under certain conditions, this statute provides that certain doctors, pharmacists and other official persons for official purposes are entitled to have certain types of drugs under certain conditions specifically set forth.

This young lady is charged with violating 54-542.101 (a), which reads except as authorized by this chapter, and the Court tells you as a matter of law her category does not fall in any category that is claimed, such as a pharmacist, doctor or an included person, so, therefore, it shall be unlawful for any person knowingly or intentionally (1) to possess with intent, to distribute a controlled drug.

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The controlled drug referred to is the one identified among many of them in this statute—marihuana is a controlled drug.

The Court tells you that as a matter of law it is so specified in the law of Virginia.

Therefore, the statute reads for this case it is except as authorized by this chapter, it shall be unlawful for any person knowingly or intentionally to possess with intent to distribute marihuana.

The statute further reads that a conviction for violation of this section may be based solely upon the evidence as to the quantity of the marijuana unlawfully possessed.

You must go further, however, in order to convict. You must be satisfied beyond a reasonable doubt that this

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defendant did the act knowingly or intentionally, that is, that she knowingly possessed this trunk and that in the knowing possession of it that she knew what was in the trunk, and she knew it contained marihuana, and the Government must satisfy you of that fact, because it is from the possession, it is from the possession of marihuana, it is from the possession of a large quantity of marihuana,

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among others and all other facts and circumstances in this case that you may, but as I am telling you, you are not required to infer from all of this relevant evidence, that she intended to distribute it. In other words, the Government doesn't have to prove an actual sale of the drug but they do have to prove that she possessed it with such an intention and that the intention to sell can be inferred from the amount in question and from all the other relevant circumstances in this case.

# In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-239

HARRIOTT H. CHILDS, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

**MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

Petitioner was indicted (Pet. App. B) in the United States District Court for the Eastern District of Virginia for knowingly possessing 40 pounds of marihuana with intent to distribute it, in violation of the Assimilative Crimes Act, 18 U.S.C. 13, incorporating Section 54-524.101(a) of the Code of Virginia.[1] She was found guilty after a jury trial and was sentenced to three years' imprisonment, all but six months of which was suspended. The court of appeals affirmed (Pet. App. A).

Petitioner contends that her conviction for possessing a controlled drug with intent to distribute it was

[1] The offense took place within the special territorial jurisdiction of the United States (Washington National Airport).



476-134—72

unconstitutional because the Virginia Code provision defining her offense stated that a finding of intent to distribute "may be based solely upon evidence as to the quantity" of the substance possessed and she argues that this language creates an unconstitutionally vague and irrational presumption. The argument is not well founded. The quoted language, which has since been repealed by the Virginia legislature, did not purport to establish a presumption of guilt based on quantity, but merely authorized an inference of intent if the jury chose to draw it. The provision did nothing more than state the obvious—that intent to distribute may sometimes be inferred solely from the amount of a drug found in the person's possession.[2]

In any event, the trial judge here instructed that intent should be determined from all the evidence in the case, including, but not limited to, the large amount of marihuana (16 bricks) in petitioner's trunk.[3] As the court of appeals pointed out, the trial judge did not limit his charge to the challenged pro-

[2] *United States* v. *Manarite*, 448 F. 2d 583, 594 (C.A. 2), certiorari denied, 404 U.S. 947, for example, sustained the validity, as applied, of a similar provision in 18 U.S.C. 1465. We note also that the federal courts have uniformly upheld the rationality of an inference of intent to distribute from the quantity of the item possessed. *E.g.*, *United States* v. *Ortiz*, 445 F. 2d 1100, 1104–1105 (C.A. 10), certiorari denied, 404 U.S. 993, dealing with former 21 U.S.C. 331(q)(3), punishing possession of depressant or stimulant drugs with intent to distribute. As that opinion points out, the legislative history of that statute plainly showed that Congress meant to allow intent to dispose of a drug to be proved from the quantity possessed.

[3] In addition to the quantity of the drug possessed by petitioner there was other evidence in the case from which the jury was entitled to infer that she intended to distribute the drug

vision, but instead "employed the standard of proof of intent normally to be applied in the absence of any statutorily authorized inference" (Pet. App. A 6). The court below therefore properly found it unnecessary to pass upon the constitutionality of the now repealed statutory provision.

In *Leary* v. *United States*, 395 U.S. 6, 51, this Court noted that a brick of marihuana of this size will furnish approximately 3,300 marihuana cigarettes. Sixteen bricks would be enough for approximately 52,800 such cigarettes. Thus, although the petition rhetorically wonders (Pet. 7–8) whether "possession of two 'joints' of marihuana" would constitute a sufficient quantity to justify a rational inference of intent to distribute, this is hardly the case in which to pursue that inquiry. One whose conduct is clearly and validly covered by a statute is in no position to urge that it might not be properly applicable to someone else under dramatically different circumstances. *United States* v. *Rames*, 362 U.S. 17, 21.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
*Solicitor General.*

SEPTEMBER 1972.

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(Pet. App. A 5): "The circumstances in this case, including the quantity, method of packaging, false name of addressee, and other facts, were more than sufficient to justify the submission of the issue of intent to distribute to the jury. People do not normally order a thirty-pound trunk load of marihuana for personal use, especially when packaged as this shipment was."

U.S. GOVERNMENT PRINTING OFFICE: 1972

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MICHAEL RODAK, JR.

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO. _____

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HARRIOTT H. CHILDS,

*Petitioner*,

v.

UNITED STATES OF AMERICA,

*Respondent*.

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## PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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PHILIP J. HIRSCHKOP,
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*Counsel for Petitioner*.

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO. .....

HARRIOTT H. CHILDS,

*Petitioner*,

v.

UNITED STATES OF AMERICA,

*Respondent*.

## PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

After the Petition for a Writ of Certiorari was filed a significant and controlling case was decided by the Virginia Supreme Court.

As pointed out in the Petition for a Writ of Certiorari, Harriott Childs accepted delivery of a footlocker at National Airport which was later found to contain thirty-five pounds of marijuana. The trial judge in the United States District Court for the Eastern District of Virginia instructed the jury, in part, under Section 54-524.101(a) of the 1950 Code of Virginia that they could return a conviction for possession of marijuana *with intent to distribute*

"based solely upon the evidence as to the quantity of the marijuana unlawfully possessed." (Transcript page 207).

In the case of ***Dennis Joe Sharp v. Commonwealth of Virginia***, Va. , Record Number 7994, decided October 9, 1972, the Virginia Supreme Court held unconstitutional the language in Section 54-524.101(a) which formed the basis of the Court's instruction. A copy of the Opinion of the Virginia Supreme Court accompanies this Petition for Rehearing as Appendix A to the Petition for Rehearing.

The statutory language found unconstitutional was the language authorizing the jury to return a conviction for possession with intent to distribute based solely upon evidence as to the quantity of the drug unlawfully possessed. In the Opinion of Chief Justice Snead, such statutory language was so vague and ambiguous and lacked the rational nexus required by ***Leary v. United States***, 395 U.S. 6, 23 L. Ed. 2d 57, 89 Sup. Ct. 1532, that it denied defendant Sharp due process of law under the Constitution of the United States and the Constitution of the State of Virginia.

Since the Fourth Circuit's decision in the instant case, ***Harriott Childs v. United States***, was reached prior to the Virginia Supreme Court's decision in ***Sharp v. Commonwealth***, the Virginia Court sought to distinguish ***Sharp*** from ***Childs***. While there are distinctions in the two cases, they do not relate to the due process of law questions raised in ***Sharp***.

In both cases the quantity of the drug possessed was the central factor with regard to the intent to distribute. In both cases the Court instructed the jury that a Virginia Statute authorized them to return a conviction for possession with intent to distribute based solely on evidence as to quantity of the drug unlawfully possessed.

Now the Virginia Supreme Court has ruled that statutory language unconstitutional. The fact that the trial judge in *Childs* went further in defining the jury's duties does not vitiate the fact that the jury in *Childs* was instructed that they could use quantity by itself to establish the defendant's "intent to distribute."

*Childs*, prosecuted under the assimilative Crimes Act, 18 U.S.C. 13, for violation of Virginia State Law §54-524.101(a) should now be entitled to a retrial by a jury which has not been instructed by an unconstitutional provision of the law.

WHEREFORE, your Petitioner prays that a Writ of Certiorari be granted.

Respectfully submitted,

PHILIP J. HIRSCHOKOP,
110 N. Royal Street,
Alexandria, Virginia 22313

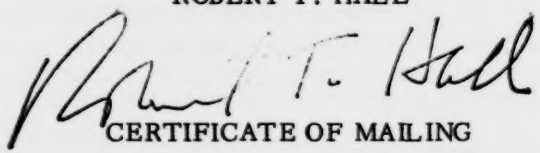
ROBERT T. HALL,
10560 Main Street,
Fairfax, Virginia 22030,

*Counsel for Petitioner.*

## CERTIFICATE OF COUNSEL

I, Robert T. Hall, Counsel for Petitioner, hereby certify that it is presented in good faith and not for delay and is restricted to presenting intervening circumstances of substantial or controlling effect.

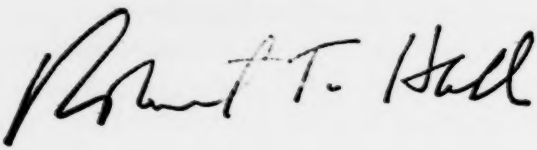
ROBERT T. HALL



## CERTIFICATE OF MAILING

I hereby certify that on the 12 day of December, 1972, I mailed, postage prepaid, copies of the aforegoing Petition for Rehearing to the Solicitor General, Department of Justice, Court Avenue between 9th and 10th Streets, Washington, D. C., 20530, and to James J. Tansey, Esquire, Department of Justice, Washington, D. C. 20530.

ROBERT T. HALL



## APPENDIX A

[fol. 1]

Present: Snead, C. J., I'Anson, Carrico, Harrison, Cochran, and Harman, JJ.

DENNIS JOE SHARP

v. Record No. 7994

COMMONWEALTH OF VIRGINIA

**OPINION BY CHIEF JUSTICE HAROLD F. SNEAD**
**Richmond, Virginia, October 9, 1972**

FROM THE CIRCUIT COURT OF FAIRFAX COUNTY
Burch Millsap, Judge

Armed with a search warrant, police officers entered premises occupied by Dennis Joe Sharp, defendant, in Fairfax County, and found under his bed two and one-half bricks of marijuana weighing a total of 1,447 grams, seventeen "baggies" of marijuana weighing a total of 257.4 grams, a phial of marijuana and a pipe with charred marijuana in the bowl.

On November 16, 1970 Sharp was indicted for possession of marijuana, a controlled drug, with intent to distribute it, in violation of §54-524.101(a), Code of 1950, as amended. A jury trial resulted in a verdict of guilty and defendant's punishment was fixed at three years confinement in the State Penitentiary and the payment of a fine of $3,000. On April 2, 1971 judgment was entered on the verdict, and we granted defendant a writ of error limited to the assignment of error alleging that the court erred in giving Instruction No. 5, which follows:

"The Court instructs the jury that a conviction of possession of marijuana with intent to distribute may be based *solely* upon evidence as to the quantity of such marijuana unlawfully possessed." (Emphasis added.)

The instruction was based upon §54-524.101(a),[1] which provided:

[fol. 2] "Except as authorized by this chapter, it shall be unlawful for any person knowingly or intentionally:

"(1) To distribute, or to possess with intent to distribute, a controlled drug;

(2) To manufacture a controlled drug.

"A conviction for a violation of this §54-524.101(a) may be based solely upon evidence as to the quantity of any controlled drug or drugs unlawfully possessed."

The defendant contends here, as he did in the court below, that the subsidiary statutory provision which authorized a conviction based solely on evidence as to quantity was void because it was unconstitutionally vague, uncertain and ambiguous, providing no standards for determining guilt, and it created an arbitrary presumption having no rational connection with the facts and circumstances.

On the other hand, the Commonwealth maintains that the statutory provision was a constitutionally valid rule of evidence, that it created a rational rebuttable presumption, and that it was clear and unambiguous.

We are of opinion that the defendant's contentions are well-founded. We have often said that a penal statute must

[1] The 1972 General Assembly repealed § 54-524.101 and in lieu thereof enacted § 54-524.101:1. The subsidiary provision, which provided that a conviction may be based solely upon evidence as to quantity, is not contained in the present statute.

be definite and certain to be valid, and it denies due process of law if it is vague or ambiguous. *Hancock v. Brown, Director*, 212 Va. 215, 218, 183 S.E.2d 149, 151 (1971). In *Caldwell v. Commonwealth*, 198 Va. 454, 458, 94 S.E.2d 537, 540 (1956) we said:

> "It is elementary that an act creating a statutory offense, to be valid, must specify with reasonable certainty and definiteness the conduct which is commanded or prohibited, that is, what must be done or avoided, so that a person of ordinary intelligence may know what is thereby required of him .... The enactment should define the acts to be done or not to be done which constitute such offense with such certainty that a person may determine whether or not he has violated the law at the time he does or fails to do the
> [fol. 3] act, which is charged to be a violation thereof ... Unless an act creating a statutory offense satisfies this requirement of certainty and definiteness it violates the Due Process Clauses of the Fourteenth Amendment and of the Virginia Constitution."

Under the subsidiary provision of the statute, a person of ordinary intelligence in possession of a quantity of marijuana could not with reasonable certainty know whether he was guilty of the misdemeanor of mere possession or the felony of possession with intent to distribute.

We are further of opinion that the statutory inference or presumption of possession with intent to distribute did not have sufficient rational connection with the fact of possession of a quantity of a controlled drug. This Court stated in *Burnette v. Commonwealth*, 194 Va. 785, 790, 75 S.E.2d 482, 485 (1953):

"The general rule approved by various decisions and legal articles is that the test of the constitutionality of such statutes making proof of a certain fact *prima facie* or presumptive evidence of another fact, is whether there is a natural and rational evidentiary relation between the fact proven and the ultimate fact presumed, and that the inference of one fact from proof of another must not be so unreasonable as to be purely arbitrary. To state the rule in positive terms, in order for such a statute to be valid, there must be some rational connection between the fact proved and the ultimate fact to be established.

See also *Nance v. Commonwealth*, 203 Va. 428, 124 S.E.2d 900 (1962); *Dooley v. Commonwealth*, 198 Va. 32, 92 S.E.2d 348 (1956).

This rule is in accord with that enunciated by the United States Supreme Court in *Leary v. United States*, 395 U.S. 6, 36 (1969), in which it was said:

[fol. 4] "[A] criminal statutory presumption must be regarded as 'irrational' or 'arbitrary', and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend."

The case of *United States v. Childs*, ... F.2d ... (4th Cir., 1972) is distinguishable from the case at bar. There, although the instruction was based on §54-524.101(a), the trial judge specifically instructed the jury that possession of a large quantity of marijuana may be considered *among all other relevant facts and circumstances* to infer intent to distribute, but that the jury was not required to infer from the evidence that the defendant intended to distribute it.

In the instant case, Instruction No. 5, which told the jury that a conviction of possession of marijuana with intent to distribute may be based *solely* upon evidence as to quantity, improperly emphasized quantity alone and permitted the jury to disregard other facts and circumstances relating to intention. We hold that the instruction was erroneously given.

Accordingly, the judgment of the trial court will be reversed. However, our holding that the subsidiary provision of Code §54-524.101(a) is unconstitutional does not affect the validity of the substantive offense created by the statute. The case will, therefore, be remanded for a new trial.

*Reversed and remanded.*

# In the Supreme Court of the United States

OCTOBER TERM, 1972

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No. 72-239

HARRIOTT H. CHILDS, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR REHEARING OF ORDER DENYING CERTIORARI*

---

**MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

---

This Memorandum is submitted in response to the order of this Court on December 11, 1972, requesting the United States to file a reply to the petition for rehearing.

1. After a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted of having knowingly possessed some forty pounds of marijuana with intent to distribute it, in violation of the Assimilative Crimes Act, 18 U.S.C. 13, incorporating Section 54-524.101(a) of the Code



491-375—72——1

of Virginia.[1] She was sentenced to three years' imprisonment, all but six months of which was suspended. The court of appeals affirmed, 463 F. 2d 390 (C.A. 4), and this Court denied certiorari on October 24, 1972.

In the court of appeals and in this Court, petitioner contended that a subsidiary paragraph of the section of the Virginia Code under which she had been convicted was invalid as creating an irrational inference that falls under the rationale of *Leary* v. *United States,* 395 U.S. 6. Under that provision, which has been repealed by the 1972 Virginia General Assembly, a conviction for violating Section 54–524.101(a) could be "based solely upon evidence as to the quantity" of any controlled substance possessed. The United States Court of Appeals for the Fourth Circuit held that it was unnecessary to pass upon the validity of this Virginia provision since the trial judge, in his final instructions setting forth the elements of the crime and the proof required to establish them, told the jury that it could infer intent to distribute the marijuana from all the evidence in the case, including the amount of marijuana possessed. The court concluded that the district judge "did not rest his instruction on the sufficiency of proof of intent to distribute on the statutory standard, *i.e.,* 'solely upon evidence of the quantity'," 463 F. 2d at 393. In our opposition to certiorari we pointed out that, in addition to the other evidence

[1] The offense occurred within the special territorial jurisdiction of the United States (Washington National Airport).

properly before the jury regarding intent to distribute, the quantity of marijuana in petitioner's possession—enough for many thousands of marijuana cigarettes—would itself rationally warrant an inference of intent to distribute without regard to the challenged paragraph in the Virginia Code.

2. In her petition for rehearing, petitioner relies upon the decision of the Virginia Supreme Court in *Sharp* v. *Commonwealth,* 192 S.E. 2d 217, decided October 9, 1972, holding the challenged portion of Section 54–524.101(a) unconstitutional because of vagueness and because it created an arbitrary inference under the standards of *Leary.*[2]

When petitioner filed her original typewritten petition for rehearing on November 16, 1972, we noticed that the last page of the opinion in *Sharp* v. *Commonwealth, supra,* in her Appendix had not been included. We promptly notified the Clerk of this Court of this omission and on November 20, 1972, in response to the Clerk's inquiry, petitioner's counsel supplied the missing page, to be attached to the typewritten petition for

[2] The court based its vagueness ruling on the fact that Virginia law also punishes as a misdemeanor the mere possession of marijuana without an intent to distribute: "a person of ordinary intelligence in possession of a quantity of marijuana could not with reasonable certainty know whether he was guilty of the misdemeanor * * * or the felony * * *" (192 S.E. 2d at 218). The Fourth Circuit in this case noted that the challenged provision might be vague but pointed out that this would not affect the validity of the substantive offense created by the statute, 463 F. 2d at 392. The Virginia Supreme Court, in remanding the *Sharp* case for a new trial, reached the same conclusion. 192 S.E. 2d at 219.

rehearing. However, on November 24, 1972, petitioner replaced the typewritten copies by serving printed copies of her petition for rehearing [3] and again the last page of the *Sharp* opinion was not included. We again informed petitioner's counsel of this and were assured that petitioner would promptly file superseding printed copies containing the missing page.[4] Three weeks later, on December 14, 1972, after this Court had called for the government's response on December 11, 1972, petitioner filed and served these superseding copies.

Since we believe that the omitted portion of the *Sharp* opinion, which specifically discusses and distinguishes the present case, shows that the petition for rehearing should not be granted and since this portion of the opinion may not have been before the Court, we quote it in its entirety:

* * * * *

> "[A] criminal statutory presumption must be regarded as 'irrational' or 'arbitrary,' and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend."

---

[3] We understand that these printed copies were distributed to the Court.

[4] Since this Court's Rule 58(3) does not permit the filing of a response to a petition for rehearing, unless requested, we advised the Clerk by telephone that possibly pertinent material was missing from the printed rehearing petition and that counsel informed us that the omission was a clerical oversight that would be corrected by substitution of new petitions.

> The case of *United States* v. *Childs*, —— F.2d —— (4th Cir., 1972) is distinguishable from the case at bar. There, although the instruction was based on § 54–524.101(a), the trial judge specifically instructed the jury that possession of a large quantity of marijuana may be considered *among all other relevant facts and circumstances* to infer intent to distribute, but that the jury was not required to infer from the evidence that the defendant intended to distribute it. [Emphasis in court's opinion.]
>
> In the instant case, Instruction No. 5, which told the jury that a conviction of possession of marijuana with intent to distribute may be based *solely* upon evidence as to quantity, improperly emphasized quantity alone and permitted the jury to disregard other facts and circumstances relating to intention. We hold that the instruction was erroneously given.
>
> Accordingly, the judgment of the trial court will be reversed. However, our holding that the subsidiary provision of Code § 54–524.101(a) is unconstitutional does not affect the validity of the substantive offense created by the statute. The case will, therefore, be remanded for a new trial.
>
> *Reversed and remanded.*

There is thus no reason to grant the petition for rehearing. As the above quotation from *Sharp* reveals, the Virginia Supreme Court itself considered petitioner's case correctly decided because the district court had not permitted the jury to rely on the challenged portion of Section 54–524.101(a), but had, in the words of the Fourth Circuit in this case,

"employed the standard of proof of intent normally to be applied in the absence of any statutorily authorized inference" (463 F. 2d at 393). Thus, as both the Fourth Circuit here and the Virginia Supreme Court in *Sharp* concluded, petitioner's conviction was not affected by the statutory inference in Section 54–524.101(a). Whether or not the Virginia Supreme Court was correct in ruling unconstitutional one (previously repealed) provision in a state statute, both that court and the court below properly concluded that the possible invalidity of that provision does not taint the jury's verdict in the present case.

It is therefore respectfully submitted that the petition for rehearing should be denied.

ERWIN N. GRISWOLD,
*Solicitor General.*

A. RAYMOND RANDOLPH, JR.,
*Assistant to the Solicitor General.*

DECEMBER 1972.

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